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June 29, 2011

Corbin Davis
Clerk of the Supreme Court

Sent by E-mail to msc_clerk@courts.mi.gov

RE: ADM File No. 2011-04
Proposed Amendment of Rule 3.911

Dear Clerk Davis:

I am writing to support the proposed amendment of 3.911 as the author of the amendment and an ineffective parent attorney. I am ineffective because, as a retained attorney, I often cannot get a jury trial for my clients. Two weeks ago I had another jury demand stricken because the 14 day time limit in the current rule had expired days earlier during the representation of a court appointed attorney. By the time most clients hire me—usually because they have witnessed a disappointing performance of their court appointed attorney at the earlier hearings with no other communication—the right to jury trial has already been unwittingly forfeited by an uninformed or unrepresented parent in the first few weeks of the case. In another county where my demand was timely, I obtained the first child protection jury trial in 25 years in a child protection case.

The current court rule uses the notification of the right to a jury as one trigger for the jury demand. Although the preliminary hearing rule requires the court to advise the respondent parent of the right to a jury trial, that is not always done orally. The notice can be contained in a summons for the petition or for the next court hearing along with a lot of other legalese a frightening threats, like the one attached, which few parents at this stressful time even read, [1] and most cannot comprehend or respond to without adequate counsel. As the supporters of the amendment to Rule 3.915 attest, in some counties a parent does not get an attorney appointed early enough to provide that advice. The summons notice controls and the important right to a jury trial is lost in two weeks by parents, who may not have any lawyer, or may have been appointed an inadequate lawyer who remained mute on the subject or unavailable during the critical first two weeks of their representation.[2]

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[1] I concur with the description of the State Bar in its comments on the state of mind and stressors on the parent at this early and critical stage.

[2] American Bar Association Center on Child and the Law, *Legal Representation for Parents in Child Welfare Proceedings: A Performance-Based Analysis of Michigan Practice* (2009); Vivek Sankaran, *A Hidden Crisis: The Need to Strengthen Representation of Parents in Child Protection Proceedings*, 89 Mich Bar J 37-39 (Oct 2010).

This rule amendment was presented to this Court by the Parent Representation Committee of the Court Improvement Program of SCAO. We were tasked with suggesting reforms in response to the 2009 critique of parent representation commissioned by SCAO and conducted by the American Bar Association. The subcommittee that created this proposed rule was the Conditions for Advocacy subcommittee comprised of a cross-section of participants in the child welfare legal system: a family division judge; a career prosecutor and agency attorney; a parent attorney; a law clinic parent advocate; and a CASA volunteer. The full committee was similarly professionally diverse and unanimously voted to send the amendment to this Court with the attached comment on our reasons.

I agree with some of the opponents that the proposed rule will increase jury trials in child welfare cases. That is the intended outcome – to achieve fairness in procedure and parity in numbers with jury trials in criminal cases and other civil cases. This rule amendment was proposed to create a meaningful and fair opportunity for a parent to exercise her or right to a jury decision on their fitness before the state intervenes further in their family. The amendment will hopefully improve the shockingly low numbers of jury trials. It does so by increasing and clarifying the time limits for a jury demand and decreasing the barriers created by the current triggers and time limits in Rule 3.911. Parents in Michigan have a unique and important state constitutional and statutory right to a jury trial at adjudication. [3] But that right is rarely exercised or provided. According to this Court's data in its annual reports on child protection cases, in 2002-2010 Michigan parents got a jury trial in only 2%-4% of the adjudication trials each year:

	Total Trials	Jury Trials	Percent Jury
2002	1,800	59	3.2%
2003	1,570	31	1.9%
2004	1,521	29	1.9%
2005	1,535	41	2.6%
2006	1,408	47	3.3%
2007	1,370	26	1.9%
2008	1,227	27	2.2%
2009	1,099	29	2.7%
2010	1,135	47	4.1%

This is far below the frequency of jury trials in other circuit court cases as reported in this Court's annual reports from 2006-2010. Jury trials comprise about two-thirds of the criminal trials. In civil cases, there is about a 50-50 split between jury and bench trials. By comparison, a 2-4% incidence of jury trials in child welfare cases is suspicious for systemic causes. There are multiple hypotheses of the causes of this disparity. There could be judicial discouragement, agency manipulation,[4] and disinterested parent attorneys to blame. But the restrictive jury

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[3] Only four states provide a jury trial at adjudication. The other three are Colorado, Wisconsin, and Wyoming.

[4] Mostly, that manipulation plays out in two-parent cases where the trial court is following the one-parent doctrine for jurisdiction. As observed by Judge William Whitbeck, the child welfare agency "could make a

demand court rule is surely a contributory factor when the more liberal jury demands in general civil and criminal cases in circuit court yields many more jury trials. There is no valid reason to make it harder to get a jury trial for the loss of one's children than for the interests at stake in other civil or criminal cases.

The time limits in the amendment strike the right balance between the rights of parents and court administration. A cut-off of the jury demand three weeks before trial should be adequate to accommodate court scheduling and the only jury specific administrative task that requires advance notice, the jury pool summons process. All cases can have last minute settlements or procedural changes that disrupt the calendar, making scheduling unpredictable, and resulting in wasted court time. Civil litigants settle on the courthouse steps. Accused criminals plead during trial. And parents in child protection cases plead the day of a bench trial, which creates the same block of unused court time envisioned by the opponents of this jury rule change, but that routinely occur in all dockets.

When the United States Supreme Court was faced with similar administrative objections to having court hearings on parental fitness, it said, "Procedure by presumption is always cheaper and easier than individualized determination." [5] That is not to say that most of our juvenile judiciary cannot provide a fair bench trial. But I am certain that most parents believe that they would get a fairer trial from a jury. In their view, the jury is composed of unbiased members of the community—former children and likely empathetic parents—who do not expect parental perfection and who, most importantly, were not involved with taking or keeping their children or harshly judging them in prior court hearings. Parents who believe they are being treated fairly by the court system are more likely to engage in services and other court requirement to get a safe and speedier reunification with their children.[6] That saves money and saves families.

Sincerely,

Elizabeth Warner

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calculated guess concerning which parent was less likely to demand a jury trial [and] proceed only against that parent...simply in order to preclude one parent from demanding a jury trial". *In re Irwin,* unpublished per curiam opinion of the Court of Appeals dated July 13, 2001 (Docket No 229012) (Whitbeck, J, concurring). This has happened. *In re Church,* unpublished per curiam opinion of the Court of Appeals dated Apr 11, 2006 (Docket No 263541) (the targeted custodial parent denied a jury trial after her estranged husband was given a plea bargain to minimal neglect).

[5] *Stanley v Illinois,* 405 US 645, 657 (1972).

[6] Vivek Sankaran, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempowers Parents and Why it Matters,* 11 Mich Child Welfare J 11-19 (Fall 2007).

Approved, SCAO

Legal Software, Inc
(800) 530-2255

STATE OF MICHIGAN JUDICIAL CIRCUIT - FAMILY DIVISION JACKSON COUNTY	SUMMONS: ORDER TO APPEAR (CHILD PROTECTIVE PROCEEDINGS)	CASE NO. 11-1319-NA PETITION NO.

Court address
312 S. Jackson Street, Jackson, Mi 49201

Court telephone no.
(517)788-4268

1. In the matter of KEELY HOWARD 8/19/03 RYAN CONRAD 7/8/05 JEREMY WILKINSON 2/5/10
(name(s), alias(es), DOB)

2. To:
JAMIE HOWARD
BRIAN WARNE-uncontested
MICHAEL CONRAD
SCOTT WILKINSON

3. **YOU ARE ORDERED** to appear in person before the court for a hearing on the allegations in the attached petition. The above named child(ren)'s appearance ☐ is ☒ is not necessary.

4. The date, time, and place of the hearing are: **JULY 12, 2011 AT 8:30 AM 312 S JACKSON STREET COURTROOM #500**

5. The purpose of the hearing is:

☒ to decide, **at a trial**, whether one or more of the statutory grounds alleged in the petition are true.
☐ to rule on a request that your parental rights over the child(ren) be terminated.
☐ to decide if you are the father of the above named child(ren).
☐ other:

6. **RIGHT TO ATTORNEY:** As a respondent you have the right to be represented by an attorney. If you want an attorney, you should hire one immediately so the attorney will be ready on the hearing date. If you want an attorney but are not financially able to hire an attorney, you should contact the court immediately about a court appointed attorney.

7. **RIGHT TO TRIAL BY JURY:** If you want a jury to decide the facts **at the trial**, you must file a written request with the court within 14 days after the court gives notice of the right to jury trial or 14 days after an appearance by an attorney, whichever is later, but no later than 21 days before trial. **There is no right to a jury at a termination of parental rights hearing.**

8. **RIGHT TO TRIAL BY JUDGE:** Either a judge or a referee may decide the facts at a trial without a jury. If you want a judge to decide the facts **at the trial**, you must file a written request with the court within 14 days after the court gives notice of the right to a judge or 14 days after an appearance by an attorney, whichever is later, but no later than 21 days before trial.

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter, please contact the court immediately to make arrangements.

WARNING: You are notified that this hearing may result in a temporary or permanent loss of your rights to the child(ren).

FAILURE TO APPEAR may subject you to the penalty for contempt of court, and a bench warrant may be issued for your arrest.

MAY 18, 2011
Date

Judge Susan E Beebe

P63085
Bar no.

Do not write below this line - For court use only

MCL 712A.13, MCR 3.911, MCR 3.912, MCR 3.915, MCR 3.920

Appendix to Conditions for Advocacy Workgroup Report to the Quality Representation Committee February 19, 2010

1. PROPOSED AMENDMENT TO MCR 3.911: JURY

(B) Jury demand. A party who is entitled to a trial by jury may demand a jury by filing a written demand with the court ~~within~~

~~(a) 14 days after the court give notice of the right to jury trial, or~~

~~(b) 14 days after an appearance by an attorney, or lawyer-guardian ad litem, whichever is later, but~~

no later than 21 days before trial. The court may excuse a late filing in the interest of justice.

Purpose of Amendment: The current 14 day time limits are difficult to apply due to ambiguity and unnecessarily limit a party's right to jury trial. The right to jury trial could be cut-off unfairly and prematurely. For example, the attorney may enter an appearance on the first day of the preliminary hearing or the court could put the notice of the right to jury trial in the summons. In both those common circumstances, the right could expire by the end of the preliminary hearing. This is too early for the party to make an informed decision on a jury demand. The maximum deadline for a jury demand of 21 days prior to trial in the existing rules is clearer and conforms to deadlines for other pretrial matters. See MCR 3.922.